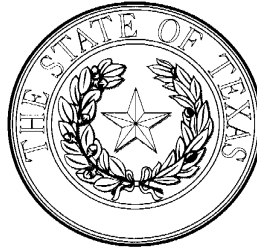


Opinion issued July 26, 2022



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-21-00326-CV

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**A STATUS CONSTRUCTION LLC, Appellant**  
V.  
**CITY OF BELLAIRE, TEXAS, Appellee**

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**On Appeal from the 129th District Court**  
**Harris County, Texas**  
**Trial Court Case No. 2020-51751**

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**MEMORANDUM OPINION**

A Status Construction LLC appeals from the trial court's order granting the City of Bellaire's plea to the jurisdiction in this contract dispute. The City asserted governmental immunity, but A Status argues that governmental immunity has been

waived by statute. We reverse the trial court's order granting the plea to the jurisdiction and remand for further proceedings.

## **BACKGROUND**

The City hired A Status to repair and improve two streets in the city. The work included replacing existing asphalt and concrete pavement, replacing sidewalks, and installing a new storm sewer and new water line with new fire hydrants, valves, and service connections. The City and A Status signed two contracts detailing the work involved. A Status alleged in its first amended petition that the City provided A Status with faulty design plans; because of these faulty design plans, A Status found unexpected underground pipes that had to be moved, which caused delays, extra work, change orders, and requests for time extensions. A Status alleged that, although it submitted timely requests for time extensions with all necessary supporting documents, the City did not respond to the requests for over seven months, which caused additional delays and expenses. A Status believed the City was obligated under the contracts to pay these additional expenses, so A Status requested payment from the City. When the City refused to pay, A Status sued.

The City filed a plea to the jurisdiction, claiming that governmental immunity barred all of A Status's claims. The trial court agreed and granted the plea. A Status now appeals.

## **DISCUSSION**

### **A Status's First through Fifth Points of Error**

A Status raises five points of error relating to the language of the trial court's order granting the City's plea to the jurisdiction. The order states that the trial court considered the City's first amended plea to the jurisdiction but then states, "[T]he Court hereby GRANTS Defendant's Plea to the Jurisdiction." A Status contends that the order in fact grants the City's original plea to the jurisdiction and not its first amended plea to the jurisdiction. The order also lacks any decretal language that would make the order a final judgment. A Status argues that the trial court erred by (1) signing an order that "adjudicates nothing" because the order lacks the decretal language that would make it a final judgment; (2) granting the City's original plea to the jurisdiction without providing notice that the original plea was set for adjudication; (3) granting the City's original plea to the jurisdiction without providing notice that the original plea would be adjudicated even though it had been withdrawn, thus depriving A Status of its constitutional due-process right; (4) granting the City's original plea to the jurisdiction even though it had been withdrawn; and (5) granting the City's original plea to the jurisdiction, which was directed at A Status's original petition and not its superseding amended petition—A Status's live pleading. These points of error are all directed at the particular language

of the trial court's interlocutory order that seems to grant the City's original plea to the jurisdiction instead of the City's first amended plea to the jurisdiction.

We do not need to consider A Status' first point of error because, even though the trial court's order lacks the language of a final judgment, it is clearly an interlocutory order granting a plea to the jurisdiction filed by a governmental unit, which we have jurisdiction to review. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8); *see also* TEX. R. APP. P. 47.1 (written opinion of appellate court need not address issues unnecessary to final disposition of the appeal).

We also do not need to consider A Status's second, third, fourth, and fifth points of error relating to the trial court's particular language that seems to grant the City's original plea to the jurisdiction instead of the City's first amended plea to the jurisdiction because A Status's sixth and final point of error is determinative of this appeal. *See* TEX. R. APP. P. 47.1. Because we are reversing the interlocutory order and remanding for further proceedings based on A Status's sixth point of error, we need not discuss any other potential errors in the interlocutory order because they would yield only the same relief. *See ATI Enters., Inc. v. Din*, 413 S.W.3d 247, 255–56 (Tex. App.—Dallas 2013, no pet.); *see also* TEX. R. APP. P. 47.1.

## **A Status's Sixth Point of Error**

In its sixth point of error, A Status contends the trial court erred in granting the City's plea to the jurisdiction because the legislature has expressly waived governmental immunity for the claims A Status asserted against the City. We agree.

### **Standard of Review**

This court has jurisdiction to review a trial court's interlocutory order denying or granting a plea to the jurisdiction filed by a governmental unit. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). We review a trial court's ruling on a plea to the jurisdiction de novo. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

When a plea to the jurisdiction challenges the pleadings, we determine if the plaintiff has met its initial burden to "allege[] facts that affirmatively demonstrate the [trial] court's jurisdiction to hear the cause." *Id.* at 226. "We construe the pleadings liberally in favor of the plaintiff[] and look to the pleader's intent." *Id.* "If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiff[] should be afforded the opportunity to amend." *Id.* at 226–27. "If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff[] an opportunity to amend." *Id.* at 227.

When a plea to the jurisdiction challenges the existence of jurisdictional facts, our review mirrors that of a traditional summary-judgment motion. *Id.* at 228. “[W]e consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do.” *Id.* at 227. If the defendant meets its burden to establish that the trial court lacks jurisdiction, the plaintiff is then required to show that there is a material fact question regarding the jurisdictional issue. *See id.* at 227–28. “If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the factfinder.” *Id.* “[I]f the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.” *Id.* at 228.

### **Governmental Immunity**

The City is a local governmental entity. *See* TEX. LOC. GOV’T CODE § 271.151(3). Local governmental entities are entitled to governmental immunity unless it is expressly waived. *Lubbock Cnty. Water Control & Improvement Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 (Tex. 2014).<sup>1</sup> Governmental immunity

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<sup>1</sup> Although courts often use the terms “sovereign immunity” and “governmental immunity” interchangeably, “they involve two distinct concepts”: sovereign immunity “refers to the State’s immunity from suit and liability” and “also protects the various divisions of state government, including agencies, boards, hospitals, and

includes both immunity from liability, “which bars enforcement of a judgment against a governmental entity,” and immunity from suit, which deprives the trial court of subject-matter jurisdiction and completely bars a plaintiff’s claim. *Id.* (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006)). Because governmental immunity from suit implicates the trial court’s subject-matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *Tarrant Reg’l Water Dist. v. Johnson*, 572 S.W.3d 658, 664 (Tex. 2019).

A local governmental entity that enters into a contract “necessarily waives immunity from liability, voluntarily binding itself like any other party to the terms of agreement, but it does not waive immunity from suit.” *Church & Akin*, 442 S.W.3d at 300 (quoting *Tooke*, 197 S.W.3d at 332). We defer to the legislature to “decide whether and when to waive” governmental immunity. *Id.* at 301. Any legislative waiver of immunity must be “clear and unambiguous.” TEX. GOV’T CODE § 311.034; *Church & Akin*, 442 S.W.3d at 301.

**A. Local Government Contract Claims Act**

A Status contends that the Local Government Contract Claims Act waives governmental immunity from suit for its breach-of-contract claim against the City and that it has pleaded a substantial claim that meets the Act’s conditions. Because

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universities,” whereas governmental immunity “protects political subdivisions of the State, including counties, cities, and school districts.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).

immunity has been waived, A Status argues, the trial court erred in granting the City's plea to the jurisdiction.

***1. Applicable law***

The Local Government Contract Claims Act waives a local governmental entity's immunity from suit for certain breach-of-contract claims. *See Zachry Constr. Corp. v. Port of Houston Auth.*, 449 S.W.3d 98, 106–07 (Tex. 2014). Section 271.152 of the Act states:

A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV'T CODE § 271.152. A “contract subject to this subchapter” includes “a written contract stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity.” *Id.* § 271.151(2)(A).

The “terms and conditions of this subchapter” referenced in Section 271.152 include the limitations on awards set out in Section 271.153 of the Act:

(1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;

(2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract;



(3) reasonable and necessary attorney’s fees that are equitable and just; and

(4) interest as allowed by law, including interest as calculated under Chapter 2251, Government Code.

*Id.* § 271.153(a). These limitations on awards and other provisions of the Act “define the scope of its waiver of immunity.” *Zachry Constr.*, 449 S.W.3d at 108.

To establish jurisdiction by a waiver of immunity under the Act, a plaintiff must establish “a demand for certain kinds of damages” as limited by Section 271.153. *Id.* at 109–10 (“[T]he Act does not waive immunity from suit on a claim for damages not recoverable under Section 271.153.”). But the purpose of Section 271.153 “is to limit the amount due by a governmental agency on a contract once liability has been established, not to foreclose the determination of whether liability exists.” *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 840 (Tex. 2010). The waiver of immunity does not depend on ultimate liability on a claim, “though it does require a showing of a substantial claim that meets the Act’s conditions.” *Zachry Constr.*, 449 S.W.3d at 109. “Substantial claim” means that the “claimant must plead facts with some evidentiary support that constitute a claim for which immunity is waived, not that the claimant will prevail.” *Id.* at 110.

## 2. *Analysis*

### *a. A Status's initial burden*

A Status bears the burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction. *See Miranda*, 133 S.W.3d at 226. A Status has done so. In its live pleading, A Status alleged that the City entered into a contract subject to the Act and breached that contract, and A Status requested damages that are recoverable under Section 271.153: the balance due and owed under the contract, the amount owed for change orders and additional work, and attorney's fees.

A Status's factual allegations support this breach-of-contract claim and request for damages. A Status alleged that the construction project encountered delays, extra work, change orders, and the need for time extensions because of the City's faulty design plans and that A Status submitted change orders and time-extension requests to the City in accordance with the contract, but the City did not respond for over seven months. The City's lack of response caused further delays and did not comply with the contract provisions requiring the City to grant sufficient time extensions within ten days after A Status notified the City's engineer of the request. These delays resulted in significant impact costs, change orders, and extra work under the contracts for which the City has not paid.

Thus, A Status pleaded a substantial claim against the City that met the Act's conditions, *see Zachry Constr.*, 449 S.W.3d at 109, because A Status stated a breach-

of-contract claim for which immunity had been waived under Section 271.152 and sought damages recoverable under Section 271.153 of the Act. Whether the City will ultimately be liable on this claim is not a factor we consider at the plea-to-the-jurisdiction stage.

A Status met its initial burden, so the burden shifts to the City to establish that the trial court lacks jurisdiction. *See Miranda*, 133 S.W.3d at 227–28. We next consider the City’s arguments that trial court lacked jurisdiction because governmental immunity had not been waived.

*b. Whether damages are recoverable under contracts*

The City in its first amended plea to the jurisdiction argued that governmental immunity had not been waived because the contracts did not allow recovery of the damages A Status was seeking, and therefore there was no balance “due and owed . . . under the contract” that could be recovered under Section 271.153. With no recoverable damages, the City argued, there was no waiver of immunity under Section 271.152.

For instance, the City identified several provisions in the contracts that disclaim liability for the design plans and allocate risk for the discovery of unknown underground conditions to A Status, such as:

- “It is [A Status’s] responsibility to determine the depth, location and existence of any existing utilities which may conflict with the proposed construction by referring to available records, consulting appropriate municipal departments and utility owners and by making necessary exploration and excavations.”

- “It is not represented that PLANS show all existing storm sewer, sanitary sewer, water, gas, telephone, and electrical facilities and other underground structures.”
- “It is the [A Status’s] responsibility to relocate all utilities as necessary to function properly and to properly fulfill the installation requirements of this contract. This includes lowering or adjusting water services and gas services exposed during construction.”
- “The potential of utilities and structures abandoned previously and not shown on the plans exist. [A Status] shall include costs for removal of such utilities and structures and associated debris . . . in the unit price bid for the related item. . . . The City is not responsible for claims for downtime costs resulting from delays.”

The contracts clearly disclaim the City’s liability for the accuracy of the design plans and unknown underground conditions, the City argued, so the City cannot be liable for A Status’s resulting delays. Relying on *Texas Southern University v. Pepper Lawson Horizon International Group, LLC*, the City argued that because A Status cannot recover damages under the contracts, immunity has not been waived. 634 S.W.3d 428, 440 (Tex. App.—Houston [1st Dist.] 2021, pet. filed).

But the City’s argument speaks to its ultimate liability under the contract and does not address whether immunity has been waived. The Act’s waiver of immunity is not dependent on ultimate liability. *Zachry Constr.*, 449 S.W.3d at 109. Waiver of immunity only requires a “showing of a substantial claim that meets the Act’s conditions,” *id.*, which we have already concluded A Status has done. Although the contracts may preclude ultimate recovery of certain damages, A Status has pleaded there is a balance due and owed under the contract, which is “simply the amount of

damages for breach of contract payable and unpaid.” *Id.* at 111. A Status has pleaded recoverable damages under Section 271.153; whether it will actually be able to recover those damages is not a part of our inquiry at this stage.

Furthermore, *Pepper Lawson Horizon* is distinguishable. In that case, with similar facts involving delays under a construction contract allegedly caused by the contracting governmental entity, we held that the university’s immunity was not waived because the contractor failed to meet its burden of alleging facts that showed a breach of any express provision in the contract, not because of specific contract provisions that precluded the recovery of damages under the contract at issue. *See Pepper Lawson Horizon*, 634 S.W.3d at 436–40. We explained that the contractor failed to identify express provisions of the contract the university had allegedly breached, but we also described the express provisions that disclaimed any duty by the university to act as the contractor claimed it should have acted. *See id.* For example, the contractor claimed that the university was liable for providing inaccurate design documents but did not identify any contract provision holding the university responsible for inaccurate design documents. *Id.* at 437, 439. The contract did, on the other hand, expressly state that the university made no representations as to the accuracy of the site information and was not responsible for the contractor’s interpretation of the information. *Id.* at 439.

Unlike the contractor in *Pepper Lawson Horizon*, here, A Status has pleaded

a breach of express provisions of the contracts. A Status pleaded that, by delaying its responses to A Status's time extension requests and denying reimbursement for impact costs associated with the delays, change order requests, and extra work requests, the City breached the following provisions of the contracts:

- “5.02. EXTENSION OF TIME [. . .] [W]ithin ten (10) days after receipt of a written request for an extension of time from [A Status], supported by all requested documentation, the [City's engineer] shall submit such written request, together with his written recommendation, to the City Council of the City of Bellaire for consideration, and the City Council shall grant an extension of time for completing the work, sufficient to compensate for the delay.”
- “5.03 HINDRANCES AND DELAYS [. . .] No claim shall be made by [A Status] for damages resulting from hindrances or delays from any cause during the progress of any portion of the work embraced in this Contract, except where the work is stopped by order of the [City] . . . in which event such expense as in the judgment of the [City's engineer] is caused by such stoppage of said work shall be paid by the [City] to [A Status].”<sup>2</sup>
- “2.05 DAMAGES - In the event [A Status] is damaged in the course of the completion of the work by the act, negligence, omission, mistake or default of the [City] or of the PROFESSIONAL or of any other contractor employed by the [City] upon the work, thereby causing loss to [A Status], the [City] agrees that it will reimburse [A Status] for such loss. In the event the [City] is damaged in the course of the work by the act, negligence, omission, mistake or default of [A Status], or should [A Status] unreasonably delay the progress of the work being done by others on the job so as to cause loss for which the [City] becomes liable, then [A Status] shall reimburse the [City] for such loss.”

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<sup>2</sup> A Status has not alleged that the City issued a stop order; however, it has alleged that work on the project was stopped because of the City's inaction and that it is owed the resulting expenses. Because A Status has alleged other breaches of express provisions of the contract, with supporting facts, whether A Status has sufficiently alleged a breach of this provision is immaterial at this point.

A Status's allegations that the City breached express provisions of the contract distinguish this case from *Pepper Lawson Horizon*.

The City identified several other provisions in the contracts that, according to the City, foreclosed A Status's recovery of damages. Specifically, the contracts provide that if A Status presents a claim for payment to the City and the City does not pay within 30 days, then A Status must file suit within 60 days of presenting the claim or else it forfeits the right to make that claim for payment. The City claimed that A Status did not file suit within 60 days of presenting the claim, so it forfeited its right to make a claim for payment for most of the damages it sought. The contracts also prohibited damages for delays during the construction project unless work was stopped by the City's order, which A Status did not allege the City had ordered. The City also argued it could not be liable for change orders related to additional work on the projects because the change orders are unsigned. Further, A Status used the wrong method to calculate compensation for additional work it performed, so A Status was precluded from recovering the damages it sought that were calculated by that method. Finally, the City argued the contracts do not authorize money damages for the City's denial of time-extension requests and that the decision to grant a time-extension request was at the City's discretion.

Each of these arguments goes to the merits of A Status's claim against the City and addresses the City's ultimate liability under the contracts, not the issue of

whether governmental immunity has been waived. *See San Antonio River Auth. v. Austin Bridge & Rd., L.P.*, 601 S.W.3d 616, 631 (Tex. 2020) (concluding governmental immunity waived where contractor sought damages it alleged were owed under contract, even though question of whether governmental entity was in fact required to pay additional amount under contract still in dispute); *see also Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (plea to jurisdiction “does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction”). Even if the City is not ultimately liable on the breach-of-contract claim, A Status was only required to plead a claim for which immunity is waived, not to establish that it would prevail. *See Zachry Constr.*, 449 S.W.3d at 110.

A Status has alleged that the City entered into contracts subject to Section 271.152 and has breached express provisions of those contracts, and A Status has asserted a claim for damages recoverable under Section 271.153. A Status has met its initial burden to allege facts that affirmatively demonstrate the trial court’s jurisdiction, as we have already concluded, but the City has not met its burden to establish that the trial court lacks jurisdiction. *See Miranda*, 133 S.W.3d at 226–28.

#### **B. Prompt Pay Act**

A Status also alleged that the City violated Chapter 2251 of the Government Code, the Prompt Pay Act, and A Status sought interest and attorney’s fees under



that chapter. The City argued in its plea to the jurisdiction that Chapter 2251 does not expressly waive immunity so A Status cannot maintain a claim for interest or attorney's fees under that chapter.

***1. Applicable law***

Chapter 2251 requires a governmental entity to pay the amount due under a contract within 31 days after the service under the contract is completed; after that, the overdue payment begins to accrue interest at a rate higher than normal prejudgment interest. TEX. GOV'T CODE §§ 2251.021, 2251.025. Chapter 2251 also provides that, in a formal judicial or administrative proceeding to collect a payment or interest due under that chapter, the opposing party "shall pay the reasonable attorney fees of the prevailing party." *Id.* § 2251.043.

Chapter 2251 waives immunity from liability but does not expressly waive immunity from suit. *See City of Midland v. M.T.D. Env't, L.L.P.*, 429 S.W.3d 800, 804 (Tex. App.—Eastland 2014, no pet.). Interpreting an earlier version of the Local Government Contract Claims Act, some courts have held that the Act does not waive immunity from suit for attorney's fees under Chapter 2251, either. *See, e.g., McMahon Contracting, L.P. v. City of Carrollton*, 277 S.W.3d 458, 465–66 (Tex. App.—Dallas 2009, pet. denied) ("[The Act] cannot be read to establish waiver of immunity from suit for attorney fees by attaching [Chapter 2251] claims to it or as an express waiver of immunity in [Chapter 2251]."). However, the legislature has

amended the Act to expressly allow recovery of attorney's fees and recovery of interest under Chapter 2251. TEX. LOC. GOV'T CODE § 271.153(a)(3), (4). Thus, even though Chapter 2251 itself does not waive immunity from suit for interest and attorney's fees arising from a breach-of-contract claim, the Local Government Contract Claims Act does.

## 2. *Analysis*

A Status alleged that the City violated Chapter 2251 by not paying the amount due under the contract within 30 days after A Status completed its work, and A Status sought the interest and attorney's fees required under that chapter.

The City argued that governmental immunity had not been waived under Chapter 2251 because the chapter itself does not expressly waive immunity, relying on cases such as *M.T.D. Environmental*, 429 S.W.3d at 806 (holding Chapter 2251 did not waive immunity from suit for attorney's fees or interest); *see also Harris Cnty. Flood Control Dist. v. Great Am. Ins. Co.*, 309 S.W.3d 614, 618 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Port-Neches Groves Indep. Sch. Dist. v. Pyramid Constructors, L.L.P.*, 281 S.W.3d 142, 150 (Tex. App.—Beaumont 2009, pet. denied); *McMahon Contracting*, 277 S.W.3d at 465; *City of San Antonio v. KGME, Inc.*, 340 S.W.3d 870, 878 (Tex. App.—San Antonio 2011, no pet.). Although these cases each hold that Chapter 2251 does not expressly waive governmental immunity from suit, a proposition that is not in question, none of these

cases analyzed a contract signed after the legislature amended the Local Government Contract Claims Act. That Act expressly waives immunity for breach-of-contract claims and now allows recovery of attorney’s fees and recovery of interest under Chapter 2251.<sup>3</sup>

A Status has met its initial burden to allege facts that affirmatively demonstrate the trial court’s jurisdiction, as we have already concluded, but the City has not met its burden to establish that the trial court lacks jurisdiction. *See Miranda*, 133 S.W.3d at 226–28.

The City argues on appeal that A Status cannot recover attorney’s fees under Chapter 2251 because, without a valid breach-of-contract claim under the Local Government Contract Claims Act, that Act does not waive immunity from suit for attorney’s fees under Chapter 2251. However, we have already concluded that A Status has stated a valid breach-of-contract claim for which immunity is waived under the Local Government Contract Claims Act.

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<sup>3</sup> This Court has also explained why the legislature’s amendment referencing Chapter 2251 was unnecessary to conclude the Act waived immunity for a claim for interest under Chapter 2251, disagreeing with *M.T.D. Environmental* and similar cases:

The new statute waives immunity for “interest as allowed by law, *including* interest as calculated under [the Prompt Payment Act].” The word “including” precedes a “list . . . for purposes of illustration”—it does not suggest a limitation. We could read the amendment to illustrate an example of interest that was already allowed under the previous version of the statute.

*County of Galveston v. Triple B Servs., LLP*, 498 S.W.3d 176, 188–89 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (alteration in original) (citations omitted).

## C. Other Jurisdictional Arguments

The City raised two new jurisdictional arguments on appeal, but these arguments are likewise unavailing. A defendant may raise a jurisdictional argument for the first time on appeal, in which case “remand may be appropriate to afford the plaintiff a ‘fair opportunity to address’ the jurisdictional argument.” *Harris County v. Annab*, 547 S.W.3d 609, 616 (Tex. 2018) (quoting *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 96 (Tex. 2012)).

### 1. *Whether claim sounds in tort or contract*

The City argues that the trial court properly granted the City’s plea to the jurisdiction because A Status’s claim is actually a tort claim for which immunity is not waived, not a contract claim. The City argues that A Status has essentially pleaded a negligent misrepresentation claim because A Status alleged that the City provided faulty design plans—a misrepresentation of existing fact—and that A Status relied on those plans to its detriment. *See JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653–54 (Tex. 2018) (stating elements of negligent misrepresentation).<sup>4</sup> The Local Government Contract Claims Act

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<sup>4</sup> The elements of a negligent misrepresentation claim are: “(1) a representation made by a defendant in the course of its business or in a transaction in which it has a pecuniary interest; (2) the representation conveyed ‘false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation.’” *Orca*

expressly does not waive immunity for tort claims. TEX. LOC. GOV'T CODE § 271.157 (“This subchapter does not waive sovereign immunity to suit for a cause of action for a negligent or intentional tort.”).

“[A] plaintiff may not recast [its] claim in the language of another cause of action to avoid limitations or compliance with mandatory statutes or to circumvent existing case law contrary to the plaintiff’s position.” *Gandy v. Williamson*, 634 S.W.3d 214, 243 (Tex. App.—Houston [1st Dist.] 2021, pet. denied).

In determining whether a claim sounds in tort or contract, the Supreme Court has analyzed “both the source of the duty and the nature of the remedy.” *Formosa Plastics Corp. USA v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41, 45 (Tex. 1998). The Court has explained the guidelines to distinguish between contract and tort causes of action:

If the defendant’s conduct—such as negligently burning down a house—would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff’s claim may also sound in tort. Conversely, if the defendant’s conduct—such as failing to publish an advertisement—would give rise to liability only because it breaches the parties’ agreement, the plaintiff’s claim ordinarily sounds only in contract. In determining whether the plaintiff may recover on a tort theory, it is also instructive to examine the nature of the plaintiff’s loss. When the only loss or damage is to the subject matter of the contract, the plaintiff’s action is ordinarily on the contract.

*Id.* (quoting *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991)).

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*Assets*, 546 S.W.3d at 653–54 (quoting *Fed. Land Bank Ass’n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1992)).

Here, A Status has stated a claim for breach of contract. While A Status alleged that the City provided faulty design plans, A Status alleged that providing these faulty design plans breached the contracts because the contracts state the City is responsible for the design plans. A Status also alleged the City breached the contracts by failing to timely respond to its time-extension requests. The source of the duty the City is alleged to have breached is the contract. *See id.* The damage A Status alleges it suffered is the additional economic costs it incurred because of the City's faulty design plans and delays; the only loss or damage is to the subject matter of the contracts. *See id.* Therefore, A Status's claim sounds in contract, not in tort, and is not barred by Section 271.157 of the Act. A Status has met its initial burden to allege facts that affirmatively demonstrate the trial court's jurisdiction, as we have already concluded, but the City has not met its burden to establish that the trial court lacks jurisdiction. *See Miranda*, 133 S.W.3d at 226–28.

**2. *Whether contract existed at time of breach***

The City also argues that A Status's pleading shows there was no written contract at the time of the City's alleged breach. The City's alleged breach—providing faulty design plans that A Status used in preparing its bid—necessarily occurred before the parties entered into a contract, and therefore there was no written contract at the time of the alleged breach. With no written contract, there can be no waiver of immunity under Section 271.152, the City argues, noting that whether a

written contract exists and whether it is properly executed are jurisdictional facts. *See Vantage Sys. Design, Inc. v. Raymondville Indep. Sch. Dist.*, 290 S.W.3d 312, 316 (Tex. App.—Corpus Christi—Edinburg 2009, pet. denied).

The City has not disputed that, at some point, a written contract existed between the parties or that the contract was properly executed. The City's provision of faulty design plans was not the only breach that A Status alleged in its petition; A Status also alleged that the City failed to timely respond to A Status's time-extension requests, failed to reimburse A Status for impact costs associated with delays caused by the City, and failed to reimburse A Status for damages it incurred by the City's action. Construing these allegations in A Status's favor, as we must, *see Miranda*, 133 S.W.3d at 226, A Status has sufficiently alleged a breach-of-contract claim. At most, the City has raised a fact question that must be resolved by the factfinder, in which case the trial court should not have granted the plea to the jurisdiction. *Id.* at 227–28.

For the foregoing reasons, the trial court erred in granting the City's plea to the jurisdiction. A Status's sixth point of error is sustained.

### **CONCLUSION**

We reverse the trial court's order granting the City's plea to the jurisdiction and remand this cause to the trial court for further proceedings.

Gordon Goodman  
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.